EX PARTE OR LATE FILED **ORIGINAL**

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000
FAX: (202) 393-5760
http://www.skadden.com

DIRECT DIAL
(202) 371-7044
DIRECT FAX
(202) 661-9022
EMAIL ADDRESS
DPAWLIK@SKADDEN.COM

September 1, 2000

Magalie Roman Salas, Secretary
Federal Communications Commission
Counter TW-A325
The Portals, 445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Submission of Northpoint Technology, Ltd.
ET Docket No. 98-206, RM-9147, RM-9245, DA 00-1841

Dear Ms. Salas:

In accordance with Section 1.1206 of the Commission's rules, 47 CFR § 1.1206, this letter is written to notify you that Sophia Collier, Antoinette C. Bush, and Linda Rickman of Northpoint Technology, Ltd. ("Northpoint") met on August 31, 2000 with Bryan Tramont and Deena Margolies of Commissioner Furchtgott-Roth's office. The participants discussed satellite and terrestrial sharing in the 12.2 - 12.7 GHz band. The Northpoint representatives requested that the applications filed by affiliates of BroadwaveUSA be accepted and placed on public notice for granting and discussed the deadline for such Commission action set by the Satellite Home Viewer Improvement Act of 1999. The Northpoint representatives also discussed the application filed by PDC Broadband Corporation and the options available to the Commission for handling that application, including its dismissal. The Northpoint representatives provided the enclosed written materials.

An original and eight copies of this letter and its attachments are submitted for inclusion in the public record for the above-captioned proceedings. Please direct any questions concerning this submission to the undersigned.

Respectfully submitted,

David H. Pawlik
Counsel for Northpoint Technology, Ltd.

cc: Bryan Tramont
Deena Margolies

No. of Copies rec'd 0+8
List ABCDE

Issues for the 12 GHz Rulemaking Proceeding

- Technical Sharing Rules in the 12 GHz Band

August 31, 2000

Northpoint Technology

Technical Rules to Allow Sharing Among Services in the 12 GHz Band

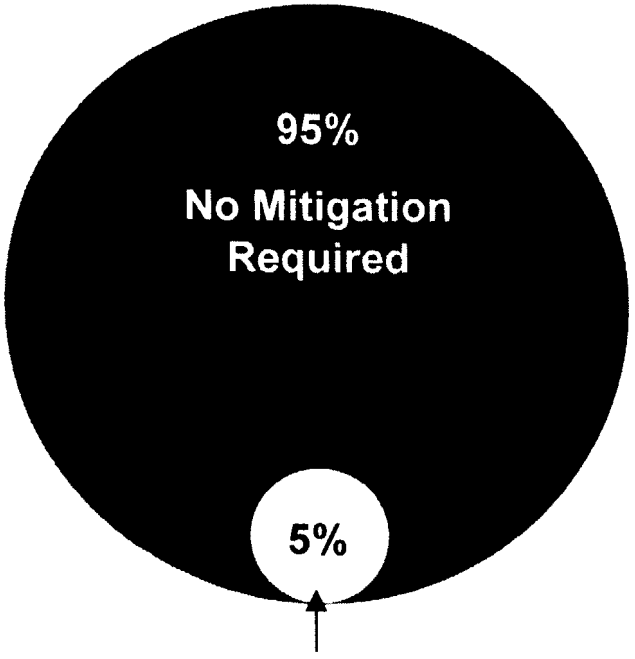
- Northpoint is committed to working to developing service rules that address legitimate DBS concerns to avoid excessive increases in consumer outages and provide a high level of protection to all DBS customers.
- In the technical record there are two DBS proposals:
  - One proposal attempts to use the NGSO criteria as a basis for Northpoint (Allocating 2.86% of the 10% NGSO interference budget to Northpoint)
  - The other is based on using a minimum Carrier to Interference ("C/I") ratio
- Northpoint's suggested standard for service rules:
  - Based on an assessment of actual consumer impact
  - Provides consumer protection against something that is serious enough to warrant regulatory action and does not impose an excessive burden on new entrants

NGSO-Based Proposal Analysis

- While the NGSO-based proposal may have some appeal because it is based on rules under consideration for another service within the current rulemaking, it is unrealistic to apply this approach to Northpoint because Northpoint terrestrial services are fundamentally different from NGSO.
- The weakness of an NGSO-based proposal for Northpoint is that it sacrifices the interest of the many for the interests of a very, very few for whom a truly excessive amount of protection is provided.
- The NGSO-based approach is so stringent that, in large parts of the country, it would preclude deployment in communities that might have benefited from competitive services - just because a tiny fraction of DBS customers in these same communities might have greater than a three minute outage in an entire year!
- This is a long, long way from harmful interference.

NGSO-Based Proposal Overview

NGSO-based Proposal



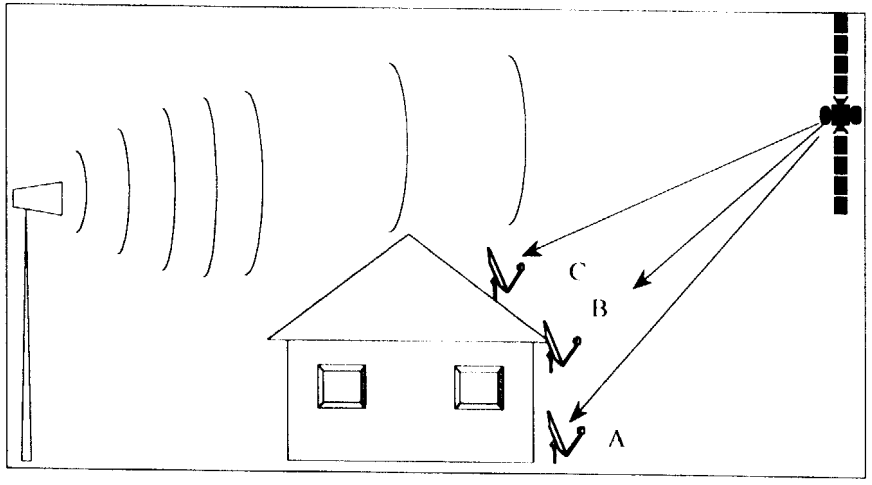
Mitigate to the extent that no DBS customer has more than a theoretical 2.86% increase in "unavailability"

Northpoint estimates that the NGSO-based proposal would impose a requirement to provide mitigation to DBS consumers in approximately 5% of its service area in order to reach the 2.86% criterion in the manner calculated by DBS.

To evaluate the NGSO-based proposal it is important to examine what benefits consumers in this 5% mitigation zone would receive from the 2.86% criterion and what costs would be borne by Northpoint and all other consumers.

Within the Proposed Mitigation Zone: 86% of All DBS Consumers Are Already Protected By Natural Shielding

- Northpoint has documented that 86% of DBS customers have installed their dish in such a way that it is naturally shielded from the Northpoint signal.
- Therefore, within the mitigation zone, 86% of DBS customers already have natural shielding and only 14% of DBS customers in this 5% area – or 0.7% of all DBS customers – would have any exposure at all to the Northpoint signal.



86% of Dish are installed as shown in positions A, B and C

Using the NGSO-based Criterion Overstates Outages by 100%

- Issue #1: The method used by DBS to calculate "unavailability" overstates actual consumer outages by about 100%.
  - DBS uses "operating threshold" values rather than "freeze frame" values to calculate DBS system "availability." The "operating threshold" is NOT the "freeze frame" level when an outage actually occurs. Instead, it is the theoretical level at which error correcting codes begin to function.
  - Therefore, during part of the time that DBS calls "unavailable," the consumer has a high quality picture and would NOT experience any outage whatsoever!
  - Based on the representative links provided to the ITU by DBS, this non-outage portion of the "unavailability" claimed by DBS equals approximately 50% of the total claimed "unavailability. Thus 10 minutes of "unavailability" = only 5 minutes of outage.
- Asking Northpoint to protect a system that is not even exhibiting an outage is truly excessive and the definition of unnecessary.

Full Pictures Are Available Even When DBS Says It Is "Unavailable"

Extract from current ITU database of BSS links provided as "representative" by the DBS industry.

BSS characteristics	Units	USA US-GSO 1(a)	USA US-GSO 1(b)
System Characteristics			
Frequency	GHz	12.7	12.700
Availability objective	%	99.92	99.94
Receiver noise Bandwidth	MHz	24	24.0
Modulation type		QPSK	QPSK
Polarization (angle as defined in Annex 2 of APS30 in case of linear polarization)		CL/CR	CL/CR
C/I due to frequency re-use (polarization discrimination)	dB		
C/I due to other GSO BSS networks	dB	20.7	23.7
C/I due to GSO FSS networks	dB	99.0	99.0
Clear sky feeder link C/N+I	dB	24.2	24.2
C/N+I required at operating threshold	dB	5	7.6
C/N+I required at the freeze frame performance point of the link (2)		3.5	6.1

Used to calculate availability

(2) When the high frequency of data errors causes the MPEG decoder to cease providing full pictures

In Order to Assess Consumer Impact One Must Consider How Television Is Viewed in the Home

- Consumers cannot be harmed by outages that occur when their televisions are turned off. This percentage of time must be considered in assessing consumer impact.
  - According to A.C. Nielsen, television is on in the home for approximately 7 hours per day or 29% of a 24 hour period.
  - Since rain – the primary cause of outages – can occur at any time in a 24 hour day, it is essential to multiply any estimate of outages by a 29% viewing factor in order to reflect actual consumer experience.
  - Put another way, for any given outage the consumer has a 71% chance of not experiencing the outage at all because his or her television is turned off.
  - When the FCC considers rules it should assess realistic cases of consumer impact, not arbitrary percentages.

What Does "2.86% in Increased Unavailability" Actually Mean for the Few Consumers Who Will Experience It?

- Consumers watch almost 2,600 hours of television a year or over 153,000 minutes.

BSS Link from ITU Database	DMA Rank	DMA	% of DBS Customers Impacted	Time Below Operating Threshold	Actual Outage Freeze Frame	After 29% Factor for Actual Viewing	Monthly minutes of increased outage
US-GSO D2(a)	1	New York	0.7%	14	8	2.3	0.19
US-GSO 4C6	2	Los Angeles	0.7%	24	11	3.3	0.28
US-GSO 4D2	3	Chicago	0.7%	21	13	3.8	0.32
US-GSO 4A3	7	Dallas	0.7%	38	27	7.9	0.66
US-GSO 4C5	11	Houston	0.7%	47	31	8.9	0.74
US-GSO 4C10	12	Seattle	0.7%	21	10	2.8	0.23
US-GSO D10(a)	15	Minneapolis	0.7%	33	16	4.5	0.38
US-GSO D1(a)	16	Florida (Miami)	0.7%	28	18	5.3	0.45
US-GSO 4A8	36	Salt Lake City	0.7%	3	1	0.4	0.03
US-GSO 4C9	37	San Antonio	0.7%	49	31	9.1	0.76
Average			0.7%	28	17	4.8	0.40

Selected links represent all U.S. cities within the ITU BSS database and show the link with highest number of minutes of "increased unavailability" as calculated by DBS among all links serving the DMA

What Would Northpoint Need to Do In Order to Provide Mitigation to the 2.86% Limit?

- In order to protect to the 2.86% level for 0.7% of DBS customers, Northpoint would need to perform an additional 50,000 square miles of mitigation on a national basis, adding significantly to its system cost and rendering uneconomical deployment in low density rural areas where each incremental repeater has fewer and fewer customers, yet service is needed most.

BSS Link from ITU Database	Rank	DMA	Square Miles in DMA	% of DMA that is Inhabited	Repeaters needed for Inhabited area	Square miles of additional mitigation proposed by DBS	Monthly minutes of outage after additional mitigation	% of DBS Customers Impacted
US-GSO D2(a)	1	New York	12,059	95%	164	738	0.19	0.7%
US-GSO 4C6	2	Los Angeles	41,271	90%	531	2,390	0.28	0.7%
US-GSO 4D2	3	Chicago	10,469	90%	135	608	0.32	0.7%
US-GSO 4A3	7	Dallas	27,526	90%	354	1,593	0.66	0.7%
US-GSO 4C5	11	Houston	17,708	85%	215	968	0.74	0.7%
US-GSO 4C10	12	Seattle	25,097	80%	287	1,292	0.23	0.7%
US-GSO D10(a)	15	Minneapolis	41,235	70%	412	1,854	0.38	0.7%
US-GSO D1(a)	16	Florida (Miami)	4,117	90%	53	239	0.45	0.7%
US-GSO 4A8	36	Salt Lake City	136,689	30%	586	2,637	0.03	0.7%
US-GSO 4C9	37	San Antonio	31,887	50%	228	1,026	0.76	0.7%
Average						1,334	0.40	0.7%

Selected links represent all U.S. cities within the ITU BSS database and show the highest minutes of "increased unavailability" among all links serving the DMA

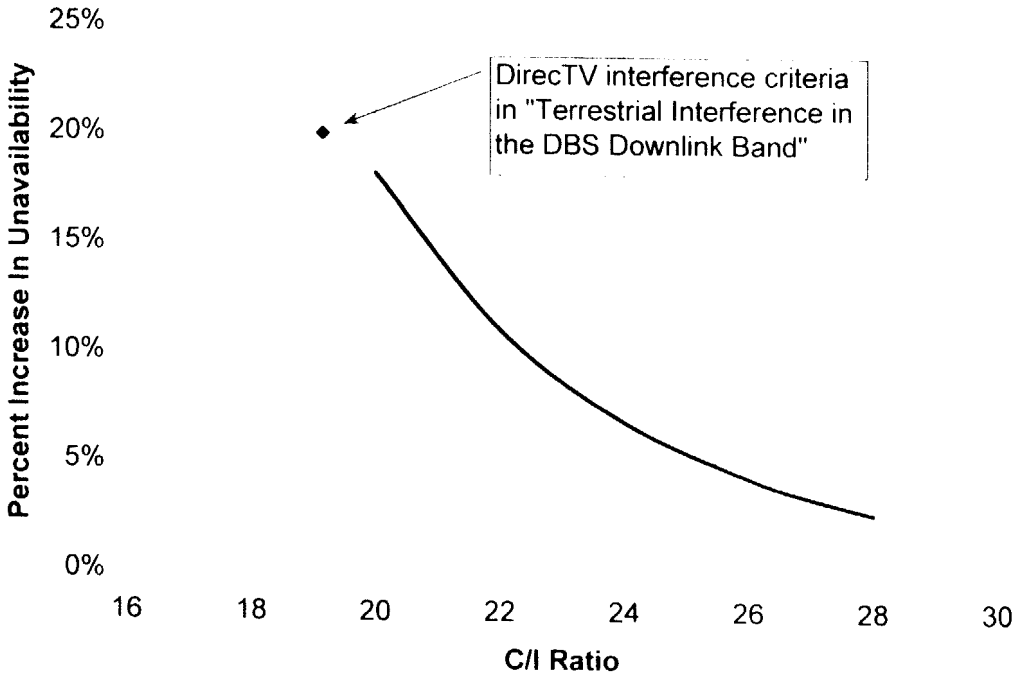
A Better Approach
Using a C/I Ratio to Create an EPFD

- Northpoint can address the legitimate DBS concern to avoid excessive increases in consumer outages and provide a high level of protection to all DBS customers by providing a minimum C/I protection. A C/I of 20 dB has been previously supported by DBS interests and can be implemented through an EPFD limit that would require mitigation below 20 dB.
- Benefits.
  - Provides an absolute threshold of protection.
  - Accounts for regional differences.
  - Provides greater average protection for all DBS consumers, not just excessive protection for a few.
  - Can be easily calculated and verified.
  - Similar to the way rules are currently written in Part 101 (Microwave).

Criteria the DBS Industry Previously Used for Sharing With Terrestrial Systems

- DirecTV used a C/I ratio of 19 dB (a 20% increase in unavailability) in "Terrestrial Interference in the DBS Downlink Band," (DirecTV, April 11, 1994).
- "Tempo believes the TI DBS report by DirecTV, which specified a C/I ratio of 19 dB, causing a reduction of 20% availability in subscriber systems is more accurate [as a standard for protection]." Comments of Tempo Satellite, Inc. in RM 9245, April 20, 1998, paragraph 5a.
- "Echostar estimates that a more acceptable Carrier-to-Interference level would be at least 20 dB (equal to the cross polarization isolation level of the Low Noise Block Down Converter with Integrated Feedhorn)." Opposition of Echostar Communications Corporation, RM 9245, April 20, 1998, page 9.

Increase in "Unavailability" Calculated Using DBS Methods



As shown previously "increase in unavailability" only means "outage" a portion of the time. The minutes of actual outage were found to be only 50% of the total "unavailable" minutes in an examination of the links in the ITU DBS database.

Validation Limit vs. Operational Protection

- The Northpoint power falls off rapidly after the 20 dB C/I contour, as shown below.
- The operational protection to DBS is much greater than this validation mask.
  - Natural shielding alone greatly increases protection to DBS.
- Under the Northpoint EPFD limit, 99.86% of the population are protected to the level to 28 dB.

C/I Ratio	Percent of Northpoint Service Area (Mask)	Operational Protection to Percent of Population*
Better than 20 dB	100%	100.00%
Better than 22 dB	99%	99.86%
Better than 28 dB	95%	99.3%

*Accounts for 86% natural shielding

What Does "C/I of 20 dB" Mean for the Few DBS Consumers Who Would Experience It?

			ANNUAL MINUTES			
BSS Link from ITU Database	DMA Rank	DMA	Additional Time Below Operating Threshold	Actual Outage Freeze Frame	After 29% Factor for Actual Viewing	Monthly Minutes
US-GSO D2(a)	1	New York	74	32	9	0.76
US-GSO 4C6	2	Los Angeles	171	61	18	1.48
US-GSO 4D2	3	Chicago	129	67	20	1.63
US-GSO 4A3	7	Dallas	244	149	43	3.60
US-GSO 4C5	11	Houston	274	148	43	3.57
US-GSO 4C10	12	Seattle	166	54	16	1.31
US-GSO D10(a)	15	Minneapolis	159	53	15	1.29
US-GSO D1(a)	16	Florida (Miami)	73	88	25	2.12
US-GSO 4A8	36	Salt Lake City	25	8	2	0.19
US-GSO 4C9	37	San Antonio	282	149	43	3.61
		Average	160	81	23	1.96

Selected links represent all U.S. cities within the ITU BSS database and show the link with highest number of minutes of "increased unavailability" as calculated by DBS among all links serving the DMA

Comparison of NGSO-Based and C/I-Based Proposals – Minutes per Month

Under the C/I-based proposal a tiny fraction of consumers will experience the additional outage shown on the table – all other consumers will have an outage smaller than indicated.

			MONTHLY		
BSS Link from ITU Database	DMA Rank	DMA	NGSO-based proposal	C/I based proposal	Difference
US-GSO D2(a)	1	New York	0.19	0.76	0.6
US-GSO 4C6	2	Los Angeles	0.28	1.48	1.2
US-GSO 4D2	3	Chicago	0.32	1.63	1.3
US-GSO 4A3	7	Dallas	0.66	3.60	2.9
US-GSO 4C5	11	Houston	0.74	3.57	2.8
US-GSO 4C10	12	Seattle	0.23	1.31	1.1
US-GSO D10(a)	15	Minneapolis	0.38	1.29	0.9
US-GSO D1(a)	16	Florida (Miami)	0.45	2.12	1.7
US-GSO 4A8	36	Salt Lake City	0.03	0.19	0.2
US-GSO 4C9	37	San Antonio	0.76	3.61	2.8
		Average	0.40	1.96	1.6

It is highly unlikely that any consumer would actually be able to tell the difference between these two proposals. It is most likely that consumer would not notice any difference at all in either case - given that television is on in the home for an average of 7 hours a day or 12,775 minutes per month, an additional 1-3 minutes is trivial.

Very Few Consumers Will Experience Increased Levels of Outages Under the C/I-Based Proposal

C/I Ratio	20-22	22-24	24-26	26-28	> 28
Minutes of outage C/I-based proposal	2.0	1.2	0.7	0.5	Less than 0.3
Minutes of outage NGSO-proposal	0.4	0.4	0.4	0.4	Less than 0.3
Difference (Minutes per Month)	1.6	0.8	0.3	0.1	-
% Population*	< 0.14%	< 0.19%	< 0.19%	< 0.19%	> 99.3%
Households**	< 105	< 142	< 142	< 142	> 74,475

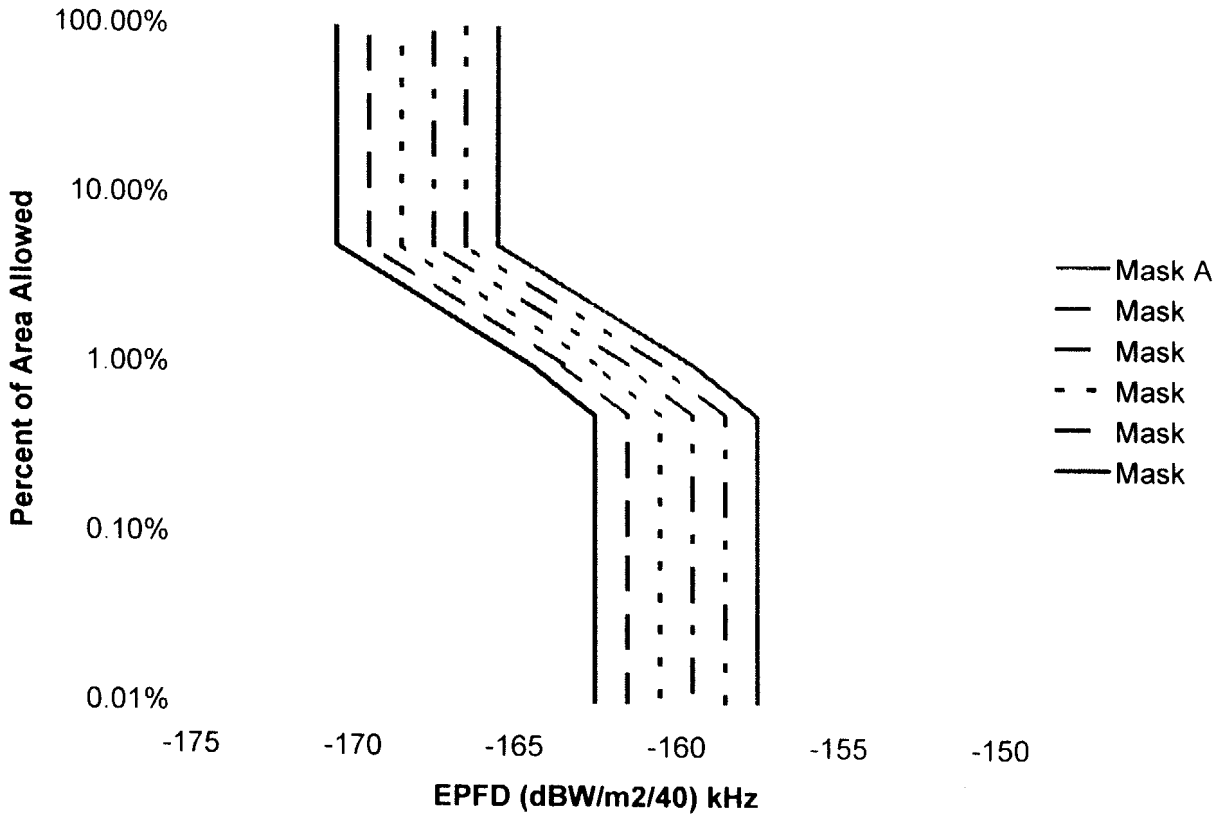
* Including effect of natural shielding only (mitigation for any consumer in 20 dB contour)
** Average city of 500,000 households.

Translating C/I levels to Power Levels to Create EPFD Limits

- An EPFD mask can be tailored for specific regions of the country to account for DBS signal power variances

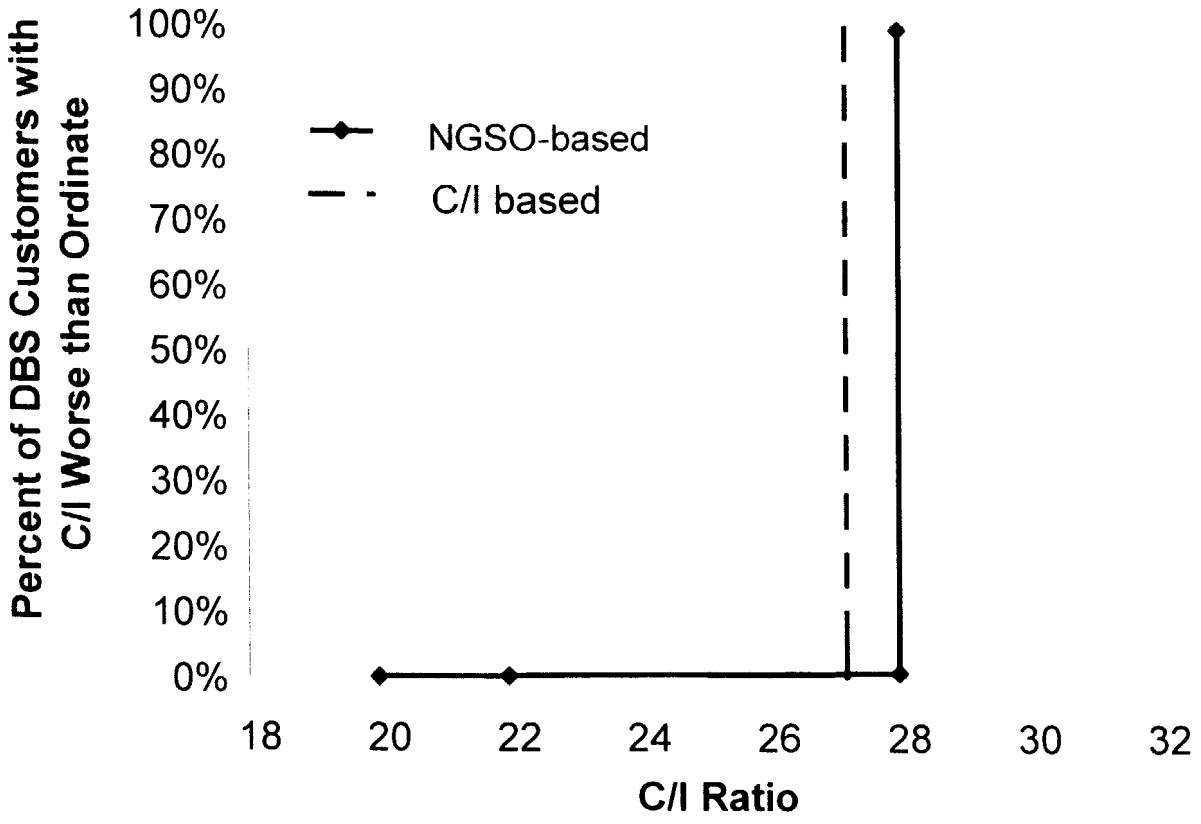
Location	DBS Signal Power (dBW/24 MHz)	C/I ratio (db)	Interference Power (dBW/24 MHz)	EPFD (dBW/m2/40 kHz)
Seattle	-124.9	20	-144.9	-163.5
Another area	-118.9	20	-138.9	-157.5

The Northpoint Equivalent Power Flux Density Mask



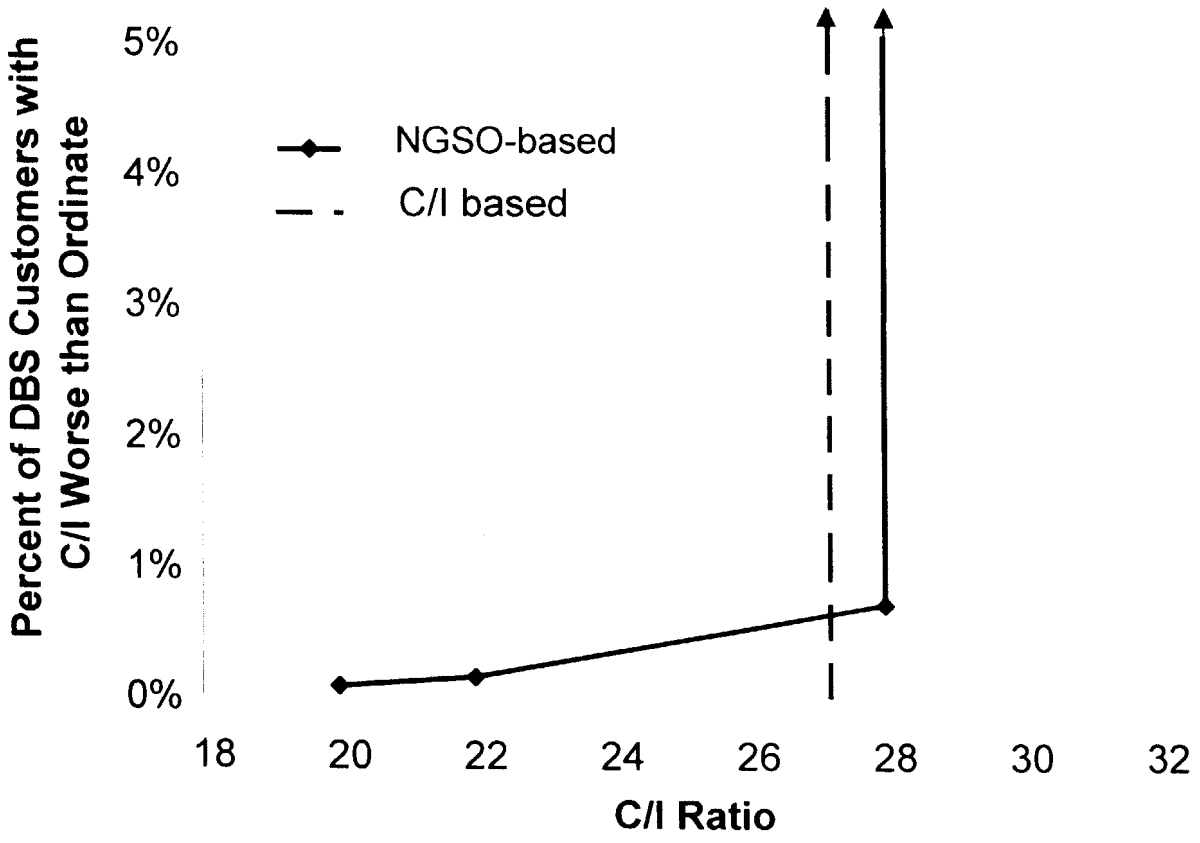
- Mask will vary to accommodate the range of DBS signal powers according to local conditions.

Comparison of NGSO-Based and C/I Based Proposals



*Operational protection provided by Northpoint EPFD Mask including the effect of natural shielding only.

Comparison of NGSO-Based and C/I Based Proposals – Close Up View



*Operational protection provided by Northpoint EPFD Mask including the effect of natural shielding only.

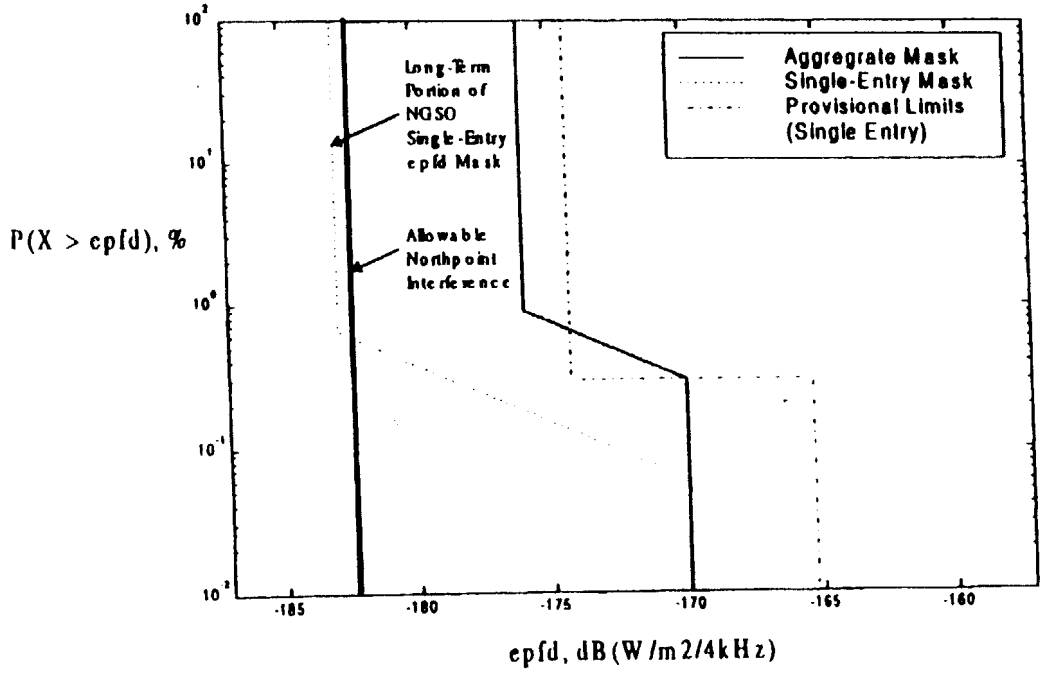
Summary

- The C/I based approach outlined in this report offers sufficient protection to DBS customers while not requiring an excessively large mitigation region and is thus greatly preferable to the NGSO-based proposal.
- This will enable Northpoint's Broadwave affiliates to deploy throughout the United States, including all of the Southwest, much of which would have been uneconomical under the NGSO-based plan.
- This will hasten new services to consumers including local signals to subscribers of satellite television services, broadband to rural areas and provide cable competition where there presently is little or none.

Sample Conversion from C/I to EPFD

Percent of Area C/I not to be exceeded	100.0%	Units
DBS Carrier Power	-124.9	dBW/24 MHz
Allowable C/I	20	dB
Allowable Interference Power	-144.9	dBW/24 MHz
Bandwidth Conversion	-27.8	dB
Gain of 1 m2 antenna	43.2	dB-m2
Peak antenna gain	34	dBi
EPFD	-163.5	dBW/m2/40 kHz

Comparison of Interference Criteria



DIRECTV Proposed Limit for Northpoint Equals Long Term Portion Of DIRECTV Proposed NGSO Single Entry Mask

Northpoint is Covered by the Satellite Home Viewer Improvement Act (S.1948) Which Requires Action on the Broadwave Licenses by November 29, 2000

The Bill

Sec. 2002 Local Television Service In Unserved and Underserved Markets.

(a) In General – No later than 1 year after the date of enactment of this Act, the Federal Communications Commission ("the Commission") shall take all actions necessary to make a determination regarding licenses or other authorizations for facilities that will utilize, for delivering local broadcast television station signals to satellite television subscribers in unserved and underserved local television markets, spectrum otherwise allocated to commercial use.

...

(c) REPORT – Not later than January 1, 2001, the Commission shall report to the Agriculture, Appropriations, and the Judiciary Committees of the Senate and the House of Representatives, the Senate Committee on Commerce and Transportation, and the House of Representatives Committee on Commerce, on the extent to which licenses and other authorizations under subsection (a) have facilitated the delivery of local signals to satellite television subscribers in unserved and underserved local television markets.

Legislative History

Congressional Record Section 2002 Analysis Entered By Senator Lott:

"To encourage the FCC to approve needed licenses (or other authorizations to use spectrum) to provide local TV service in rural areas, the Commission is required to make determinations regarding needed licenses within one year of enactment. However, the FCC shall ensure that no license or authorization provided under this section will cause "harmful interference" to the primary users of the spectrum or to public safety use."

Statements in Congressional Record

Congressman Markey:

".... Local-to-local service however, will not reach many markets initially. And even the most robust business plans on the drawing board today do not envision extending local-to-local beyond the top 70 markets or so. For that reason, we still need to address issues related to how we can supplement satellite service with the deliveyr of local TV channels in those smaller, rural markets with other wireless cable, terrestrial wireless, or cable broadcast-only basic tier availability.

Facilitating deployment of new technologies, such as wireless terrestrial service, could also advance the important priority of stimulating direct competitors to cable in all markets. ... There are, for example, several companies poised to offer competition to cable through wireless services. One of these potential cable rivals is Northpoint Technology, which could provide cable services using existing equipment."

Senator Kerry:

"I am pleased that Sec. 2002 of S. 1948 directs the Federal Communications Commission to expedite its review of license applications to deliver local television signals into all local markets. It's my understanding that the FCC has had applications pending before it since January, which, if approved, would clear the way for nationwide deployment of an innovative digital terrestrial wireless system for multi-channel video programming. ..."

Senator Leahy:

".... I'm also pleased that the Conference Report directs the Federal Communications Commission to take expedited action on getting new technologies deployed that can deliver local television signals to viewers in smaller television markets. ... it is so important for the FCC to expedite review of alternative technologies, such as the digital terrestrial wireless system developed by Northpoint Technology, which are capable of delivering local signals into all markets on a must carry basis."

In the Press

Broadcasting & Cable, Nov. 22, 1999, "Sat Story: Local In; Loans Out"

"Satellite TV companies intend initially to roll out the service in the top 20-25 markets. Whether smaller markets will be able to see their local signals over satellite remains to be seen, although language that remains in the bill allows for other facilities, such as Northpoint Technologies, to reuse commercial satellite spectrum to offer local TV signals and multichannel services."

Wall Street Journal, April 21, 2000, "A Tiny Technology Company Has Satellite Giants Fighting Hard"

"Dozens of House and Senate members have urged the FCC to approve Northpoint's bid to offer service nationwide. A clause in a satellite-TV bill passed last year – dubbed the 'Northpoint provision' by congressional staffers – requires the FCC to decide on applications involving Northpoint-type technology by the end of the year . . . ."

106TH CONGRESS
1ST SESSION

S. 1948

To amend the provisions of title 17, United States Code, and the Communications Act of 1934, relating to copyright licensing and carriage of broadcast signals by satellite.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 17, 1999

Mr. LOTT introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the provisions of title 17, United States Code, and the Communications Act of 1934, relating to copyright licensing and carriage of broadcast signals by satellite.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Intellectual Property and Communications Omnibus Reform Act of 1999".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

SEC. 1012. EFFECTIVE DATES.

Sections 1001, 1003, 1005, 1007, 1008, 1009, 1010, and 1011 (and the amendments made by such sections) shall take effect on the date of the enactment of this Act. The amendments made by sections 1002, 1004, and 1006 shall be effective as of July 1, 1999.

TITLE II—RURAL LOCAL TELEVISION SIGNALS

SEC. 2001. SHORT TITLE.

This title may be cited as the "Rural Local Broadcast Signal Act".

[illegible] LOCAL TELEVISION SERVICE IN UNSERVED AND UNDERSERVED MARKETS

(a) IN GENERAL.—Not later than 1 year after the date of the enactment of this Act, the Federal Communications Commission ("the Commission") shall take all actions necessary to make a determination regarding licenses or other authorizations for facilities that will utilize, for delivering local broadcast television station signals to satellite television subscribers in unserved and underserved local television markets, spectrum otherwise allocated to commercial use.

(b) RULES.—

(1) FORM OF BUSINESS.—To the extent not inconsistent with the Communications Act of 1934 and the Commission's rules, the Commission shall

permit applicants under subsection (a) to engage in partnerships, joint ventures, and similar operating arrangements for the purpose of carrying out subsection (a).

(2) HARMFUL INTERFERENCE.—The Commission shall ensure that no facility licensed or authorized under subsection (a) causes harmful interference to the primary users of that spectrum or to public safety spectrum use.

(3) LIMITATION ON COMMISSION.—Except as provided in paragraphs (1) and (2), the Commission may not restrict any entity granted a license or other authorization under subsection (a) from using any reasonable compression, reformatting, or other technology.

(c) REPORT.—Not later than January 1, 2001, the Commission shall report to the Agriculture, Appropriations, and the Judiciary Committees of the Senate and the House of Representatives, the Senate Committee on Commerce, Science, and Transportation, and the House of Representatives Committee on Commerce, on the extent to which licenses and other authorizations under subsection (a) have facilitated the delivery of local signals to satellite television subscribers in unserved and underserved local television markets. The report shall include—

(1) an analysis of the extent to which local signals are being provided by direct-to-home satellite television providers and by other multichannel video program distributors;

(2) an enumeration of the technical, economic, and other impediments each type of multichannel video programming distributor has encountered; and

(3) recommendations for specific measures to facilitate the provision of local signals to subscribers in unserved and underserved markets by direct-to-home satellite television providers and by other distributors of multichannel video programming service.

TITLE III—TRADEMARK CYBERPIRACY PREVENTION

SEC. 3001. SHORT TITLE; REFERENCES.

(a) SHORT TITLE.—This title may be cited as the "Anticybersquatting Consumer Protection Act".

(b) REFERENCES TO THE TRADEMARK ACT OF 1946.—Any reference in this title to the Trademark Act of 1946 shall be a reference to the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes", approved July 5, 1946 (15 U.S.C. 1051 et seq.).

program targeted at giving low-income students their own "first book."

The "First Book" program is a nonprofit private organization that has been tremendously successful gathering and distibuting new children's books to needy children throughout the nation. Key to the success of "First Book" are local boards called "First Book Local Advisory Boards." Under my legislation, which would provide $5 million a year federal investment to such boards, will help them leverage millions more in funds from other sources. "First Book" has been successful because it is locally-driven, and reflects private industry initiative. "First Book" provides new books, which the program purchases from publishers at discount rates, to disadvantaged children and families primarily through tutoring, mentoring, and family literacy programs.

This bill builds on successful efforts underway in communities across the country. It takes what has been a successful but very targeted program, and will increase its reach and effect into many more American communities. "First Book" makes a very real difference for disadvantaged children and their families, and with this investment, it will make a difference for thousands more.●

By Mrs. MURRAY:

S. 1944. A bill to provide national challenge grants for innovation in the education of homeless children and youth; to the Committee on Health, Education, Labor, and Pensions.

STUART MCKINNEY HOMELESS EDUCATION IMPROVEMENT ACT

● Mrs. MURRAY. Mr. President, today I introduce legislation on another topic I will be discussing with Chairman JEFFORDS as we move forward with reauthorization of the Elementary and Secondary Education Act in the Senate Health, Education, Labor, and Pensions Committee.

The bill deals with an improvement I hope we can make in the Stuart McKinney Homeless Education program. While the McKinney program is relatively small, my hope is that we can greatly improve its effectiveness by recognizing and funding innovative approaches for serving homeless students.

Chairman JEFFORDS and others have recognized that keeping a homeless child in their school district of origin is vital to their success. Children, especially homeless children, need continuity in their lives. Yet as a nation, we have not yet focused on funding the innovative practices that will show how this can be done and done effectively.

In addition, there are chronic problems facing homeless children, such as the problems of trying to reach out to unaccompanied homeless youth, those young people who do not have parents or guardians with them in their homeless situation. Homeless preschoolers present another whole range of issues that many schools struggle to overcome.

My legislation will provide $2 million each year in national competitive challenge grants for innovation in the education of homeless children and youth. We follow this same approach in education technology and other areas, and challenge grants are remarkably successful in sparking innovation and dissemination of new methods of instruction.

Homeless students face many challenges, and schools face challenges in serving them. Creating a small challenge grant for homeless education is one necessary step we can take to help schools help these students succeed and achieve.●

By Mr. L[redacted]

[redacted]nd the provi[redacted] of title 17, United States Code, and the Communications Act of 1934, relating to copyright licensing and carriage of broadcast signals by satellite; to the Committee on the Judiciary.

INTELLECTUAL PROPERTY AND COMMUNICATIONS OMNIBUS REFORM ACT OF 1999

Mr. LOTT. Mr. President, I ask unanimous consent that the following section-by-section analysis be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[redacted]

Section 1. Short Title. This Act may be cited as the "Intellectual Property and Communications Omnibus Reform Act of 1999."

TITLE I—SATELLITE HOME VIEWER IMPROVEMENT ACT OF 1999

When Congress passed the Satellite Home Viewer Act in 1988, few Americans were familiar with satellite television. They typically resided in rural areas of the country where the only means of receiving television programming was through use of a large, backyard C-band satellite dish. Congress recognized the importance of providing these people with access to broadcast programming, and created a compulsory copyright license in the Satellite Home Viewer Act that enabled satellite carriers to easily license the copyrights to the broadcast programming that they retransmitted to their subscribers.

The 1988 Act fostered a boom in the satellite television industry. Coupled with the development of high-powered satellite service, or DSS, which delivers programming to a satellite dish as small as 18 inches in diameter, the satellite industry now serves homes nationwide with a wide range of high quality programming. Satellite is no longer primarily a rural service, for it offers an attractive alternative to other providers of multichannel video programming, in particular, cable television. Because satellite can provide direct competition with the cable industry, it is in the public interest to ensure that satellite operates under a copyright framework that permits it to be an effective competitor.

The compulsory copyright license created by the 1988 Act was limited to a five year period to enable Congress to consider its effectiveness and renew it where necessary. The license was renewed in 1994 for an additional five years, and amendments made that were intended to increase the enforcement of the network territorial restrictions of the compulsory license. Two-year transitional provisions were created to enable local network broadcasters to challenge satellite subscribers' receipt of satellite network service where the local network broadcaster had reason to believe that these subscribers received an adequate off-the-air signal from the broadcaster. The transitional provisions were minimally effective and caused much consumer confusion and anger regarding receipt of television network stations.

The satellite license is slated to expire at the end of this year, requiring Congress to again consider the copyright licensing regime for satellite retransmissions of over-the-air television broadcast stations. In passing this legislation, the Conference Committee was guided by several principles. First, the Conference Committee believes that promotion of competition in the marketplace for delivery of multichannel video programming is an effective policy to reduce costs to consumers. To that end, it is important that the satellite industry be afforded a statutory scheme for licensing television broadcast programming similar to that of the cable industry. At the same time, the practical differences between the two industries must be recognized and accounted for.

Second, the Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism. It is well recognized that television broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements and information related to local activities. To that end, the Committee has structured the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of local television broadcast stations to subscribers who reside in the local markets of those stations.

Third, perhaps most importantly, the Conference Committee is aware that in creating compulsory licenses, it is acting in derogation of the exclusive property rights granted by the Copyright Act to copyright holders, and that it therefore needs to act as narrowly as possible to minimize the effects of the government's intrusion on the broader market in which the affected property rights and industries operate. In this context, the broadcast television market has developed in such a way that copyright licensing practices in this area take into account the national network structure, which grants exclusive territorial rights to programming in a local market to local stations either directly or through affiliation agreements. The licenses granted in this legislation attempt to hew as closely to those arrangements as possible. For example, these arrangements are mirrored in the section 122 "local-to local" license, which grants satellite carriers the right to retransmit local stations within the station's local market, and does not require a separate copyright payment because the works have already been licensed and paid for with respect to viewers in those local markets. By contrast, allowing the importation of distant or out-of-market network stations in derogation of the local stations' exclusive right bought and paid for in market-negotiated arrangements to show the works in question undermines those market arrangements. Therefore, the specific goal of the 119 license, which is to allow for a life-line network television service to those homes beyond the reach of their local television stations, must be met by only allowing distant network service to those homes which cannot receive the local network television stations. Hence, the "unserved household" limitation that has been in the license since its inception. The Committee is mindful and respectful of the

interrelationship between the communications policy of "localism" outlined above and property rights considerations in copyright law, and seeks a proper balance between the two.

Finally, although the legislation promotes satellite retransmissions of local stations, the Conference Committee recognizes the continued need to monitor the effects of distant signal importation by satellite. To that end, the compulsory license for retransmission of distant signals is extended for a period of five years, to afford Congress the opportunity to evaluate the effectiveness and continuing need for that license at the end of the five-year period.

Section 1001. Short Title

This title may be cited as the "Satellite Home Viewer Improvement Act."

Section 1002. Limitations on Exclusive Rights; Secondary Transmissions by Satellite Carriers Within Local Markets

The House and the Senate provisions were in most respects highly similar. The conference substitute generally follows the House approach, with the differences described here.

Section 1002 of this Act creates a new statutory license, with no sunset provision, as a new section 122 of the Copyright Act of 1976. The new license authorizes the retransmission of television broadcast stations by satellite carriers to subscribers located within the local markets of those stations.

Creation of a new statutory license for retransmission of local signals is necessary because the current section 119 license is limited to the retransmission of distance signals by satellite. The section 122 license allows satellite carriers for the first time to provide their subscribers with the television signals they want most: their local stations. A carrier may retransmit the signal of a network station (or superstation) to all subscribers who reside within the local market of that station without regard to whether the subscriber resides in an "unserved household." The term "local market" is defined in Section 119(j)(2), and generally refers to a station's Designated Market Area as defined by Nielsen.

Because the section 122 license is permanent, subscribers may obtain their local television stations without fear that their local broadcast service may be turned off at a future date. In addition, satellite carriers may deliver local stations to commercial establishments as well as homes, as the cable industry does under its license. These amendments create parity and enhanced competition between the satellite and cable industries in the provision of local television broadcast stations.

For a satellite carrier to be eligible for this license, this Act, following the House approach, provides both in new section 122(a) and in new section 122(d) that a carrier may use the new local-to-local license only if it is in full compliance with all applicable rules and regulations of the Federal Communications Commission, including any requirements that the Commission may adopt by regulation concerning carriage of stations or programming exclusivity. These provisions are modeled on similar provisions in section 111, the terrestrial compulsory license. Failure to fully comply with Commission rules with respect to retransmission of one or more stations in the local market precludes the carrier from making use of the section 122 license. Put another way, the statutory license overrides the normal copyright scheme only to the extent that carriers strictly comply with the limits Congress has put on that license.

Because terrestrial systems, such as cable, as a general rule do not pay any copyright royalty for local retransmissions of broadcast stations, the section 122 license does not require payment of any copyright royalty by satellite carriers for transmissions made in compliance with the requirements of section 122. By contrast, the section 119 statutory license for distant signals does require payment of royalties. In addition, the section 122 statutory license contains no "unserved household" limitation, while the section 119 license does contain that limitation.

Satellite carriers are liable for copyright infringement, and subject to the full remedies of the Copyright Act, if they violate one or more of the following requirements of the section 122 license. First, satellite carriers may not in any way willfully alter the programming contained on a local broadcast station.

Second, satellite carriers may not use the section 122 license to retransmit a television broadcast station to a subscriber located outside the local market of the station. Retransmission of a station to a subscriber located outside the station's local market is covered by section 119, and is permitted only when all conditions of that license are satisfied. Accordingly, satellite carriers are required to provide local broadcasters with accurate lists of the street addresses of their local-to-local subscribers so that broadcasters may verify that satellite carriers are making proper use of the license. The subscriber information supplied to broadcasters is for verification purposes only, and may not be used by broadcasters for any other reason. Any knowing provision of false information by a satellite carrier would, under section 122(d), bar use of the Section 122 license by the carrier engaging in such practices. The section 122 license contains remedial provisions parallel to those of Section 119, including a "pattern or practice" provision that requires termination of the Section 122 statutory license as to a particular satellite carrier if it engages in certain abuses of the license.

Under this provision, just as in the statutory licenses codified in sections 111 and 119, a violation may be proven by showing willful activity, or simple delivery of the secondary transmission over a certain period of time. In addition to termination of service on a nationwide or local or regional basis, statutory damages are available up to $250,000 for each 6-month period during which the pattern or practice of violations was carried out. Satellite carriers have the burden of proving that they are not improperly making use of the section 122 license to serve subscribers outside the local markets of the television broadcast stations they are providing. The penalties created under this section parallel those under Section 119, and are to deter satellite carriers from providing signals to subscribers in violation of the licenses.

The section 122 license is limited in geographic scope to service to locations in the United States, including any commonwealth, territory or possession of the United States. In addition, section 122(j) makes clear that local retransmission of television broadcast stations to subscribers is governed solely by the section 122 license, and that no provision of the section 111 cable compulsory license should be interpreted to allow satellite carriers to make local retransmissions of television broadcast stations under that license. Likewise, no provision of the section 119 license (or any other law) should be interpreted as authorizing local-to-local retransmissions. As with all statutory licenses, these explicit limitations are consistent with the general rule that, because statutory licenses are in derogation of the exclusive rights granted under the Copyright Act, they should be interpreted narrowly.

Section 1002(a) of this Act contains new standing provisions. Adopting the approach of the House bill, section 122(f)(1) of the Copyright Act is parallel to section 119(e), and ensures that local stations, in addition to any other parties that qualify under other standing provisions of the Act, will have the ability to sue for violations of section 122. New section 122(f)(2) of the Copyright Act enables a local television station that is not being carried by a satellite carrier in violation of the license to file a copyright infringement lawsuit in federal court to enforce its rights.

Section 1003. Extension of Effect of Amendments to Section 119 of Title 17, United States Code

As in both the House bill and the Senate amendment, this Act extends the section 119 satellite statutory license for a period of five years by changing the expiration date of the legislation from December 31, 1999, to December 31, 2004. The procedural and remedial provisions of section 119, which have already been interpreted by the courts, are being extended without change. Should the section 119 license be allowed to expire in 2004, it shall do so at midnight on December 31, 2004, so that the license will cover the entire second accounting period of 2004.

The advent of digital terrestrial broadcasting will necessitate additional review and reform of the distant signal statutory license. And responsibility to oversee the development of the nascent local station satellite service may also require for review of the distant signal statutory license in the future. For each of these reasons, this Act establishes a period for review in 5 years.

Although the section 119 regime is largely being extended in its current form, certain sections of the Act may have a near-term effect on pending copyright infringement lawsuits brought by broadcasters against satellite carriers. These changes are prospective only; Congress does not intend to change the legality of any conduct that occurred prior to the date of enactment. Congress does intend, however, to benefit consumers where possible and consistent with existing copyright law and principles.

This Act attempts to strike a balance among a variety of public policy goals. While increasing the number of potential subscribers to distant network signals, this Act clarifies that satellite carriers may carry up to, but no more than, two stations affiliated with the same network. The original purpose of the Satellite Home Viewer Act was to ensure that all Americans could receive network programming and other television services provided they could not receive those services over-the-air or in any other way. This bill reflects the desire of the Conference to meet this requirement and consumers' expectations to receive the traditional level of satellite service that has built up over the years, while avoiding an erosion of the programming market affected by the statutory licenses.

Section 1004. Computation of Royalty Fees for Satellite Carriers

Like both the House bill and the Senate amendment, this Act reduces the royalty fees currently paid by satellite carriers for the retransmission of network and superstations by 45 percent and 30 percent, respectively. These are reductions of the 27 cent royalty fees made effective by the Librarian of Congress on January 1, 1998. The reductions take effect on July 1, 1999, which is the beginning of the second accounting period for 1999, and apply to all accounting periods for the five-year extension of the section 119 license. The Committee has drafted this provision such that, if the section 119 license is renewed after 2004, the 45 percent and 30 percent reductions of the 27 cent fee will remain in effect, unless altered by legislative amendment.

In addition, section 119(c) of title 17, United States Code, is amended to clarify that in royalty distribution proceedings conducted under section 802 of the Copyright Act, the Public Broadcasting Service may act as agent for all public television copyright claimants and all Public Broadcasting Service member stations.

Section 1005. Distant Signal Eligibility for Consumers

The Senate bill contained provisions retaining the existing Grade B intensity standard in the definition of "unserved household." The House agreed to the Senate provisions with amendments, which extend the "unserved household" definition of section 119 of title 17 intact in certain respects and amend it in other respects. Consistent with the approach of the Senate amendment, the central feature of the existing definition of "unserved household" - inability to receive, through use of a conventional outdoor rooftop receiving antenna, a signal of Grade B intensity from a primary network station - remains intact. The legislation directs the FCC, however, to examine the definition of "Grade B intensity," reflecting the dBu levels long set by the Federal Communications Commission in 47 C.F.R. § 73.683(a), and issue a rulemaking within 6 months after enactment to evaluate the standard and, if appropriate, make recommendations to Congress about how to modify the analog standard, and make a further recommendation about what an appropriate standard would be for digital signals. In this fashion, the Congress will have the best input and recommendations from the Commission, allowing the Commission wide latitude in its inquiry and recommendations, but reserve for itself the final decision-making authority over the scope of the copyright licenses in question, in light of all relevant factors.

The amended definition of "unserved household" makes other consumer-friendly changes. It will eliminate the requirement that a cable subscriber wait 90 days to be eligible for satellite delivery of distant network signals. After enactment, cable subscribers will be eligible to receive distant network signals by satellite, upon choosing to do so, if they satisfy the other requirements of section 119.

In addition, this Act adds three new categories to the definition of "unserved household" in section 119(d)(10). (a) certain subscribers to network programming who are not predicted to receive a signal of Grade A intensity from any station of the relevant network, (b) operators of recreational vehicles and commercial trucks who have complied with certain documentation requirements, and (c) certain C-band subscribers to network programming. This Act also confirms in new section 119(d)(10)(B) what has long been understood by the parties and accepted by the courts, namely that a subscriber may receive distant network service if all network stations affiliated with the relevant network that are predicted to serve that subscriber give their written consent.

Section 1005(a)(2) of the bill creates a new section 119(a)(2)(B)(i) of the Copyright Act to prohibit a satellite carrier from delivering more than two distant TV stations affiliated with a single network in a single day to a particular customer. This clarifies that a satellite carrier provides a signal of a television station throughout the broadcast day, rather than switching between stations throughout a day to pick the best programming among different signals.

Section 1005(a)(2) of this Act creates a new section 119(a)(2)(B)(ii)(I) of the Copyright Act to confirm that courts should rely on the FCC's ILLR model to presumptively determine whether a household is capable of receiving a signal of Grade B intensity. The conferees understand that the parties to copyright infringement litigation under the Satellite Home Viewer Act have agreed on detailed procedures for implementing the current version of ILLR, and nothing in this Act requires any change in those procedures. In the future, when the FCC amends the ILLR model to make it more accurate pursuant to section 339(c)(3) of the Communications Act of 1934, the amended model should be used in place of the current version of ILLR. The new language also confirms in new section 119(a)(2)(B)(ii)(II) that the ultimate determination of eligibility to receive network signals shall be a signal intensity test pursuant to 47 C.F.R. § 73.686(d), as reflected in new section 339(c)(5) of the Communications Act of 1934. Again, the conferees understand that existing Satellite Home Viewer Act court orders already incorporate this FCC-approved measurement method, and nothing in this Act requires any change in such orders. Such a signal intensity test may be conducted by any party to resolve a customer's eligibility in litigation under section 119.

Section 1005(a)(2) of this Act creates a new section 119(a)(2)(B)(iii) of the Copyright Act to permit continued delivery by means of C-band transmissions of network stations to C-band dish owners who received signals of the pertinent network on October 31, 1999, or were recently required to have such service terminated pursuant to court orders or settlements under section 119. This provision does not authorize satellite delivery of network stations to such persons by any technology other than C-band.

Section 1005(b) also adds a new provision (E) to section 119(a)(5). The purpose of this provision is to allow certain longstanding superstations to continue to be delivered to satellite customers without regard to the "unserved household" limitation, even if the station now technically qualifies as a "network station" under the 15-hour-per-week definition of the Act. This exception will cease to apply if such a station in the future becomes affiliated with one of the four networks (ABC, CBS, Fox, and NBC) that qualified as networks as of January 1, 1995.

Section 1005(c) of this Act adds a new section 119(e) of the Copyright Act. This provision contains a moratorium on terminations of network stations to certain otherwise ineligible recent subscribers to network programming whose service has been (or soon would have been) terminated and allows them to continue to be eligible for distant signal services. The subscribers affected are those predicted by the current version of the ILLR model to receive a signal of less than Grade A intensity from any network station of the relevant network defined in section 73.683(a) of Commission regulations (47 C.F.R. 73.683(a)) as in effect January 1, 1999. As the statutory language reflects, recent court orders and settlements between the satellite and broadcasting industries have required (or will in the near future require) significant numbers of terminations of network stations to ineligible subscribers in this category. Although the conferees strongly condemn lawbreaking by satellite carriers, and intend for satellite carriers to be subject to all other available legal remedies for any infringements in which the carriers have engaged, the conferees have concluded that the public interest will be served by the grandfathering of this limited category of subscribers whose service would otherwise be terminated.

The decision by the conferees to direct this limited grandfathering should not be understood as condoning unlawful conduct by satellite carriers, but rather reflects the concern of the conference for those subscribers who would otherwise be punished for the actions of the satellite carriers. Note that in the previous 18 months, court decisions have required the termination of some distant network signals to some subscribers. However, the Conferees are aware that in some cases satellite carriers terminated distant network service that was not subject to the original lawsuit. The Conferees intend that affected subscribers remain eligible for such service.

The words "shall remain eligible" in section 119(e) refer to eligibility to receive stations affiliated with the same network from the same satellite carrier through use of the same transmission technology at the same location; in other words, grandfathered status is not transferable to a different carrier or a different type of dish or at a new address. The provisions of new section 119(e) are incorporated by reference in the definition of "unserved household" as new section 119(d)(10)(C).

Section 1005(d) of this Act creates a new section 119(a)(11), which contains provisions governing delivery of network stations to recreational vehicles and commercial trucks. This provision is, in turn, incorporated in the definition of "unserved household" in new section 119(d)(10)(D). The purpose of these amendments is to allow the operators of recreational vehicles and commercial trucks to use satellite dishes permanently attached to those vehicles to receive, on television sets located inside those vehicles, distant network signals pursuant to section 119. To prevent abuse of this provision, the exception for recreational vehicles and commercial trucks is limited to persons who have strictly complied with the documentation requirements set forth in section 119(a)(11). Among other things, the exception will only become available as to a particular recreational vehicle or commercial truck after the satellite carrier has provided all affected networks with all documentation set forth in section 119(a). The exception will apply only for reception in that particular recreational vehicle or truck, and does not authorize any delivery of network stations to any fixed dwelling.

Section 1006. Public Broadcasting Service Satellite Feed

The conference agreement follows the Senate bill with an amendment that applies the network copyright royalty rate to the Public Broadcasting Service the satellite feed. The conference agreement grants satellite carriers a section 119 compulsory license to retransmit a national satellite feed distributed and designated by PBS. The license would apply to educational and informational programming to which PBS currently holds broadcast rights. The license, which would extend to all households in the United States, would sunset on January 1, 2002, the date when local-to-local must-carry obligations become effective. Under the conference agreement, PBS will designate the national satellite feed for purposes of this section.

Section 1007. Application of Federal Communications Commission Regulations

The section 119 license is amended to clarify that satellite carriers must comply with all rules, regulations, and authorizations of the Federal Communications Commission in order to obtain the benefits of the section 119 license. As provided in the House bill, this would include any programming exclusivity provisions or carriage requirements that the Commission may adopt. Violations of such rules, regulations or authorizations would render a carrier ineligible for the copyright statutory license with respect to that retransmission.

Section 1008. Rules for Satellite Carriers Retransmitting Television Broadcast Signals

The Senate agrees to the House bill provisions regarding carriage of television broadcast signals, with certain amendments, as discussed below. Section 108 creates new sections 338 and 339 of the Communications Act of 1934. Section 338 addresses carriage of local television signals, while section 339 addresses distant television signals.

New section 338 requires satellite carriers, by January 1, 2002, to carry upon request all local broadcast stations' signals in local markets in which the satellite carriers carry at least one signal pursuant to section 122 of title 17, United States Code. The conference report added the cross-reference to section 122 to the House provision to indicate the relationship between the benefits of the statutory license and the carriage requirements imposed by this Act. Thus, the conference report provides that, as of January 1, 2002, royalty-free copyright licenses for satellite carriers to retransmit broadcast signals to viewers in the broadcasters' service areas will be available only on a market-by-market basis.

The procedural provisions applicable to section 338 (concerning costs, avoidance of duplication, channel positioning, compensation for carriage, and complaints by broadcast stations) are generally parallel to those applicable to cable systems. Within one year after enactment, the Federal Communications Commission is to issue implementing regulations which are to impose obligations comparable to those imposed on cable systems under paragraphs (3) and (4) of section 614(b) and paragraphs (1) and (2) of section 615(g), such as the requirement to carry a station's entire signal without additions or deletions. The obligation to carry local stations on contiguous channels is illustrative of the general requirement to ensure that satellite carriers position local stations in a way that is convenient and practically accessible for consumers. By directing the FCC to promulgate these must-carry rules, the conferees do not take any position regarding the application of must-carry rules to carriage of digital television signals by either cable or satellite systems.

To make use of the local license, satellite carriers must provide the local broadcast station signal as part of their satellite service in a manner consistent with paragraphs (b), (c), (d), and (e), FCC regulations, and retransmission consent requirements. Until January 1, 2002, satellite carriers are granted a royalty-free copyright license to retransmit broadcast signals on a station-by-station basis, consistent with retransmission consent requirements. The transition period is intended to provide the satellite industry with a transitional period to begin providing local-into-local satellite service to communities throughout the country.

The conferees believe that the must-carry provisions of this Act neither implicate nor violate the First Amendment. Rather than requiring carriage of stations in the manner of cable's mandated duty, this Act allows a satellite carrier to choose whether to incur the must-carry obligation in a particular market in exchange for the benefits of the local statutory license. It does not deprive any programmers of potential access to carriage by satellite carriers. Satellite carriers remain free to carry any programming for which they are able to acquire the property rights. The provisions of this Act allow carriers an easier and more inexpensive way to obtain the right to use the property of copyright holders when they retransmit signals from all of a market's broadcast stations to subscribers in that market. The choice whether to retransmit those signals is made by carriers, not by the Congress. The proposed licenses are a matter of legislative grace, in the nature of subsidies to satellite carriers, and reviewable under the rational basis standard. [1]

In addition, the conferees are confident that the proposed license provisions would pass constitutional muster even if subjected to the O'Brien standard applied to the cable must-carry requirement. [2] The proposed provisions are intended to preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources. The Supreme Court has found both to be substantial interests, unrelated to the suppression of free expression. [3] Providing the proposed license on a market-by-market basis furthers both goals by preventing satellite carriers from choosing to carry only certain stations and effectively preventing many other local broadcasters from reaching potential viewers in their service areas. The Conference Committee is concerned that, absent must-carry obligations, satellite carriers would carry the major network affiliates and few other signals. Non-carried stations would face the same loss of viewership Congress previously found with respect to cable noncarriage. [4]

The proposed licenses place satellite carrier in a comparable position to cable systems, competing for the same customers. Applying a must-carry rule in markets which satellite carriers choose to serve benefits consumers and enhances competition with cable by allowing consumers the same range of choice in local programming they receive through cable service. The conferees expect that, by January 1, 2002, satellite carriers' market share will have increased and that the Congress' interest in maintaining free over-the-air television will be undermined if local broadcasters are prevented from reaching viewers by either cable or satellite distribution systems. The Congress' preference for must-carry obligations has already been proven effective, as attested by the appearance of several emerging networks, which often serve underserved market segments. There are no narrower alternatives that would achieve the Congress' goals. Although the conferees expect that subscribers who receive no broadcast signals at all from their satellite service may install antennas or subscribe to cable service in addition to satellite service, the Conference Committee is less sanguine that subscribers who receive network signals and hundreds of other programming choices from their satellite carrier will undertake such trouble and expense to obtain over-the-air signals from independent broadcast stations. National feeds would also be counterproductive because they siphon potential viewers from local over-the-air affiliates. In sum, the Conference Committee finds that trading the benefits of the copyright license for the must carry requirement is a fair and reasonable way of helping viewers have access to all local programming while benefitting satellite carriers and their customers.

Section 338(c) contains a limited exception to the general must-carry requirements, stating that a satellite carrier need not carry two local affiliates of the same network that substantially duplicate each others' programming, unless the duplicating stations are licensed to communities in different states. The latter provisions address unique and limited cases, including WMUR (Manchester, New Hampshire) / WCVB (Boston, Massachusetts) and WPTZ (Plattsburg, New York)/ WNNE (White River Junction, Vermont), in which mandatory carriage of both duplicating local stations upon request assures that satellite subscribers will not be precluded from receiving the network affiliate that is licensed to the state in which they reside.

Because of unique technical challenges on satellite technology and constraints on the use of satellite spectrum, satellite carriers may initially be limited in their ability to deliver must carry signals into multiple markets. New compression technologies, such as video streaming, may help overcome these barriers however, and, if deployed, could enable satellite carriers to deliver must-carry signals into many more markets than they could otherwise. Accordingly, the conferees urge the FCC, pursuant to its obligations under section 338, or in any other related proceedings, to not prohibit satellite carriers from using reasonable compression, reformatting, or similar technologies to meet their carriage obligations, consistent with existing authority.

* * * * * *

New section 339 of the Communications Act contains provisions concerning carriage of distant television stations by satellite carriers. Section 339(a)(1) limits satellite carriers to providing a subscriber with no more than two stations affiliated with a given television network from outside the local market. In addition, a satellite carrier that provides two distant signals to eligible households may also provide the local television signals pursuant to section 122 of title 17 if the subscriber offers local-to-local service in the subscriber's market. This provision furthers the congressional policy of localism and diversity of broadcast programming, which provides locally-relevant news, weather, and information, but also allows consumers in unserved households to enjoy network programming obtained via distant signals. Under new section 339(a)(2), which is based on the Senate amendment, the knowing and willful provision of distant television signals in violation of these restrictions is subject to a forfeiture penalty under section 503 of the Communications Act of $50,000 per violation or for each day of a continuing violation.

New section 339(b)(1)(A) requires the Commission to commence within 45 days of enactment, and complete within one year after the date of enactment, a rulemaking to develop regulations to apply network nonduplication, syndicated exclusivity and sports blackout rules to the transmission of nationally distributed superstations by satellite carriers. New section 339(b)(1)(B) requires the Commission to promulgate regulations on the same schedule with regard to the application of sports blackout rules to network stations. These regulations under subparagraph (B) are to be imposed "to the extent technically feasible and not economically prohibitive" with respect to the affected parties. The burden of showing that conforming to rules similar to cable would be "economically prohibitive" is a heavy one. It would entail a very serious economic threat to the health of the carrier. Without that showing, the rules should be as similar as possible to that applicable to cable services.

Section 339(c) of the Communications Act of 1934 addresses the three distinct areas discussed by the Commission in its Report & Order in Docket No. 98 201: (i) the definition of "Grade B intensity," which is the substantive standa.d for determining eligibility to receive distant network stations by satellite, (ii) prediction of whether a signal of Grade B intensity from a particular station is present at a particular household, and (iii) measurement of whether a signal of Grade B intensity from a particular station is present

See footnotes at end of Analysis.

at a particular household. Section 339(c) addresses each of these topics.

New section 339(c) addresses evaluation and possible recommendations for modification by the Commission of the definition of Grade B intensity, which is incorporated into the definition of "unserved household" in section 119 of the Copyright Act. Under section 339(c), the Commission is to complete a rulemaking within 1 year after enactment to evaluate, and if appropriate to recommend modifications to the Grade B intensity standard for analog signals set forth in 47 C.F.R. § 73.683(a), for purposes of determining eligibility for distant signal satellite service. In addition, the Commission is to recommend a signal standard for digital signals to prepare Congress to update the statutory license for digital television broadcasting. The Committee intends that this report would reflect the FCC's best recommendations in light of all relevant considerations, and be based on whatever factors and information the Commission deems relevant to determining whether the signal intensity standard should be modified and in what way. As discussed above, the two-part process allows the Commission to recommend modifications leaving to Congress the decision-making power on modifications of the copyright licenses at issue.

Section 339(c)(3) addresses requests to local television stations by consumers for waivers of the eligibility requirements under section 119 of title 17, United States Code. If a satellite carrier is barred from delivering distant network signals to a particular customer because the ILLR model predicts the customer to be served by one or more television stations affiliated with the relevant network, the consumer may submit to those stations, through his or her satellite carrier, a written request for a waiver. The statutory phrase "station asserting that the retransmission is prohibited" refers to a station that is predicted by the ILLR model to serve the household. Each such station must accept or reject the waiver request within 30 days after receiving the request from the satellite carrier. If a relevant network station grants the requested waiver, or fails to act on the waiver within 30 days, the viewer shall be deemed unserved with respect to the local network station in question.

Section 339(c)(4) addresses the ILLR predictive model developed by the Commission in Docket No. 98-201. The provision requires the Commission to attempt to increase its accuracy further by taking into account not only terrain, as the ILLR model does now, but also land cover variations such as buildings and vegetation. If the Commission discovers other practical ways to improve the accuracy of the ILLR model still further, it shall implement those methods as well. The linchpin of whether particular proposed refinements to the ILLR model result in greater accuracy is whether the revised model's predictions are closer to the results of actual field testing in terms of predicting whether households are served by a local affiliate of the relevant network.

The ILLR model of predicting subscribers' eligibility will be of particular use in rural areas. To make the ILLR more accurate and more useful to this group of Americans, the Conference Committee believes the Commission should be particularly careful to ensure that the ILLR is accurate in areas that use star routes, postal routes, or other addressing systems that may not indicate clearly the location of the actual dwelling of a potential subscriber. The Commission should to ensure the model accurately predicts the signal strength at the viewers' actual location.

New section 339(c)(5) addresses the third area discussed in the Commission's Report & Order in Docket No. 98-201, namely signal intensity testing. This provision permits satellite carriers and broadcasters to carry out signal intensity measurements, using the procedures set forth by the Commission in 47 C.F.R. § 73.686(d), to determine whether particular households are unserved. Unless the parties otherwise agree, any such tests shall be conducted on a "loser pays" basis, with the network station bearing the costs of tests showing the household to be unserved, and the satellite carrier bearing the costs of tests showing the household to be served. If the satellite carrier and station is unable to agree on a qualified individual to perform the test, the Commission is to designate an independent and neutral entity by rule. The Commission is to promulgate rules that avoid any undue burdens being imposed on any party.

Section 1009. Retransmission Consent

Section 1009 amends the provisions of section 325 of the Communications Act governing retransmission consent. As revised, section 325(b)(1) bars multichannel video programming distributors from retransmitting the signals of television broadcast stations, or any part thereof, without the express authority of the originating station. Section 325(b)(2) contains several exceptions to this general prohibition, including noncommercial stations, certain superstations, and, until the end of 2004, retransmission of not more than two distant signals by satellite carriers to unserved households outside of the local market of the retransmitted stations, and (E) for six months to the retransmission of local stations pursuant to the statutory license in section 122 of the title 17.

Section 1009 also amends section 325(b) of the Communications Act to require the Commission to issue regulations concerning the exercise by television broadcast stations of the right to grant retransmission consent. The regulations would, until January 1, 2006, prohibit a television broadcast station from entering into an exclusive retransmission consent agreement with a multichannel video programming distributor or refusing to negotiate in good faith regarding retransmission consent agreements. A television station may generally offer different retransmission consent terms or conditions, including price terms, to different distributors. The FCC may determine that such different terms represent a failure to negotiate in good faith only if they are not based on competitive marketplace considerations.

Section 1009 of the bill adds a new subsection (e) to section 325 of the Communications Act. New subsection 325(e) creates a set of expedited enforcement procedures for the alleged retransmission of a television broadcast station in its own local market without the station's consent. The purpose of these expedited procedure is to ensure that delays in obtaining relief from violations do not make the right to retransmission consent an empty one. The new provision requires 45 day processing of local-to-local retransmission consent complaints at the Commission, followed by expedited enforcement of any Commission orders in the United States District Court for the Eastern District of Virginia. In addition, a television broadcast station that has been retransmitted in its local market without its consent will be entitled to statutory damages of $25,000 per violation in an action in federal district court. Such damages will be awarded only if the television broadcast station agrees to contribute any statutory damage award above $1,000 to the United States Treasury for public purposes. The expedited enforcement provision contains a sunset which prevents the filing of any complaint with the Commission or any action in federal district court to enforce any Commission order under this section after December 31, 2001. The conferees believe that these procedural provisions, which provide ample due process protections while ensuring speedy enforcement, will ensure that retransmission consent will be respected by all parties and promote a smoothly functioning marketplace.

Section 1010. Severability

Section 1010 of the Act provides that if any provision of section 325(b) of the Communications Act as amended by this Act is declared unconstitutional, the remaining provisions of that section will stand.

Section 1011. Technical Amendments

Section 1011 of this Act makes technical and conforming amendments to sections 101, 111, 119, 501, and 510 of the Copyright Act. Apart from these technical amendments, this legislation makes no changes to section 111 of the Copyright Act. In particular, nothing in this legislation makes any changes concerning entitlement or eligibility for the statutory licenses under sections 111 and 119, nor specifically to the definitions of "cable system" under section 111(f), and "satellite carrier" under section 119(d)(6). Certain technical amendments to these definitions that were included in the Conference Report to the Intellectual Property and Communications Omnibus Reform Act (IPCORA) of 1999 are not included in this legislation. Congress intends that neither the courts nor the Copyright Office give any legal significance either to the inclusion of the amendments in the IPCORA conference report or their omission in this legislation. These statutory definitions are to be interpreted in the same way after enactment of this legislation as they were interpreted prior to enactment of this legislation.

Section 1011(b) makes a technical and clarifying change to the definition of a "work made for hire" in section 101 of the Copyright Act. Sound recordings have been registered in the Copyright Office as works made for hire since being protected in their own right. This clarifying amendment shall not be deemed to imply that any sound recording or any other work would not otherwise qualify as a work made for hire in the absence of the amendment made by this subsection.

Section 1012. Effective dates.

Under section 1012 of this Act, sections 1001, 1003, 1005, and 1007 through 1011 shall be effective on the date of enactment. The amendments made by sections 1002, 1004, and 1006 shall be [redacted]

SIGNALS

Section 2001. Short Title

This title may be referred to as the "Rural [redacted] Signal Act."

Unserved and

To encourage the FCC to approve needed licenses (or other authorizations to use spectrum) to provide local TV service in rural areas, the Commission is required to make determinations regarding needed licenses within one year of enactment.

However, the FCC shall ensure that no license or authorization provided under this section will cause "harmful interference" to the primary users of the spectrum or to public safety use. Subparagraph (2), states that the Commission shall not license under subsection (a) any facility that causes harmful interference to existing primary users of spectrum or to public safety use. The Commission typically categorizes a licensed service as primary or secondary. Under Commission rules, a secondary service cannot be authorized to operate in the same band as a

primary user of that band unless the proposed secondary user conclusively demonstrates that the proposed secondary use will not cause harmful interference to the primary service. The Commission is to define "harmful interference" pursuant to the definition at 47 C.F.R. section 2.1 and in accordance with Commission rules and policies.

For purposes of section 2005(b)(3) the FCC may consider a compression, reformatting or other technology to be unreasonable if the technology is incompatible with other applicable FCC regulation or policy under the Communications Act of 1934, as amended.

The Commission also may not restrict any entity granted a license or other authorization under this section, except as otherwise specified, from using any reasonable compression, reformatting, or other technology.

TITLE III—TRADEMARK CYBERPIRACY PREVENTION

Section 3001. Short Title; References

This section provides that the Act may be cited as the "Anticybersquatting Consumer Protection Act" and that any references within the bill to the Trademark Act of 1946 shall be a reference to the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes," approved July 5, 1946 (15 U.S.C. 1051 et seq.), also commonly referred to as the Lanham Act.

Sec. 3002. Cyberpiracy Prevention

Subsection (a). In General. This subsection amends the Trademark Act to provide an explicit trademark remedy for cybersquatting under a new section 43(d). Under paragraph (1)(A) of the new section 43(d), actionable conduct would include the registration, trafficking in, or use of a domain name that is identical or confusingly similar to, or dilutive of, the mark of another, including a personal name that is protected as a mark under section 43 of the Lanham Act, provided that the mark was distinctive (i.e., enjoyed trademark status) at the time the domain name was registered, or in the case of trademark dilution, was famous at the time the domain name was registered. The bill is carefully and narrowly tailored, however, to extend only to cases where the plaintiff can demonstrate that the defendant registered, trafficked in, or used the offending domain name with bad-faith intent to profit from the goodwill of a mark belonging to someone else. Thus, the bill does not extend to innocent domain name registrations by those who are unaware of another's use of the name, or even to someone who is aware of the trademark status of the name but registers a domain name containing the mark for any reason other than with bad faith intent to profit from the goodwill associated with that mark.

The phrase "including a personal name which is protected as a mark under this section" addresses situations in which a person's name is protected under section 43 of the Lanham Act and is used as a domain name. The Lanham Act prohibits the use of false designations of origin and false or misleading representations. Protection under 43 of the Lanham Act has been applied by the courts to personal names which function as marks, such as service marks, when such marks are infringed. Infringement may occur when the endorsement of products or services in interstate commerce is falsely implied through the use of a personal name, or otherwise, without regard to the goods or services of the parties. This protection also applies to domain names on the Internet, where falsely implied endorsements and other types of infringement can cause greater harm to the owner and confusion to a consumer in a shorter amount of time than is the case with traditional media. The protection offered by section 43 to a personal name which functions as a mark, as applied to domain names, is subject to the same fair use and first amendment protections as have been applied traditionally under trademark law, and is not intended to expand or limit any rights to publicity recognized by States under State law.

Paragraph (1)(B)(i) of the new section 43(d) sets forth a number of nonexclusive, nonexhaustive factors to assist a court in determining whether the required bad-faith element exists in any given case. These factors are designed to balance the property interests of trademark owners with the legitimate interests of Internet users and others who seek to make lawful uses of others' marks, including for purposes such as comparative advertising, comment, criticism, parody, news reporting, fair use, etc. The bill suggests a total of nine factors a court may wish to consider. The first four suggest circumstances that may tend to indicate an absence of bad-faith intent to profit from the goodwill of a mark, and the next four suggest circumstances that may tend to indicate that such bad-faith intent exits. The last factor may suggest either bad-faith or an absence thereof depending on the circumstances.

First, under paragraph (1)(B)(i)(I), a court may consider whether the domain name registrant has trademark or any other intellectual property rights in the name. This factor recognizes, as does trademark law in general, that there may be concurring uses of the same name that are noninfringing, such as the use of the "Delta" mark for both air travel and sink faucets. Similarly, the registration of the domain name "deltaforce.com" by a movie studio would not tend to indicate a bad faith intent on the part of the registrant to trade on Delta Airlines or Delta Faucets' trademarks.

Second, under paragraph (1)(B)(i)(II), a court may consider the extent to which the domain name is the same as the registrant's own legal name or a nickname by which that person is commonly identified. This factor recognizes, again as does the concept of fair use in trademark law, that a person should be able to be identified by their own name, whether in their business or on a web site. Similarly, a person may bear a legitimate nickname that is identical or similar to a well-known trademark, such as in the well-publicized case of the parents who registered the domain name "pokey.org" for their young son who goes by that name, and these individuals should not be deterred by this bill from using their name online. This factor is not intended to suggest that domain name registrants may evade the application of this act by merely adopting Exxon, Ford, or other well-known marks as their nicknames. It merely provides a court with the appropriate discretion to determine whether or not the fact that a person bears a nickname similar to a mark at issue is an indication of an absence of bad-faith on the part of the registrant.

Third, under paragraph (1)(B)(i)(III), a court may consider the domain name registrant's *prior use, if any, of the domain* name in connection with the bona fide offering of goods or services. Again, this factor recognizes that the legitimate use of the domain name in online commerce may be a good indicator of the intent of the person registering that name. Where the person has used the domain name in commerce without creating a likelihood of confusion as to the source or origin of the goods or services and has not otherwise attempted to use the name in order to profit from the goodwill of the trademark owner's name, a court may look to this as an indication of the absence of bad faith on the part of the registrant.

Fourth, under paragraph (1)(B)(i)(IV), a court may consider the person's bona fide noncommercial or fair use of the mark in a web site that is accessible under the domain name at issue. This factor is intended to balance the interests of trademark owners with the interests of those who would make lawful noncommercial or fair uses of others' marks online, such as in comparative advertising, comment, criticism, parody, news reporting, etc. Under the bill, the mere fact that the domain name is used for purposes of comparative advertising, comment, criticism, parody, news reporting, etc., would not alone establish a lack of bad-faith intent. The fact that a person uses a mark in a site in such a lawful manner may be an appropriate indication that the person's registration or use of the domain name lacked the required element of bad-faith. This factor is not intended to create a loophole that otherwise might swallow the bill, however, by allowing a domain name registrant to evade application of the Act by merely putting up a noninfringing site under an infringing domain name. For example, in the well know case of Panavision Int'l v. Toeppen, 141 F.3d 1316 (9th Cir. 1998), a well known cybersquatter had registered a host of domain names mirroring famous trademarks, including names for Panavision, Delta Airlines, Neiman Marcus, Eddie Bauer, Lufthansa, and more than 100 other marks, and had attempted to sell them to the mark owners for amounts in the range of $10,000 to $15,000 each. His use of the "panavision.com" and "panaflex.com" domain names was seemingly more innocuous, however, as they served as addresses for sites that merely displayed pictures of Pana Illinois and the word "Hello" respectively. This bill would not allow a person to evade the holding of that case—which found that Mr. Toeppen had made a commercial use of the Panavision marks and that such uses were, in fact, diluting under the Federal Trademark Dilution Act—merely by posting noninfringing uses of the trademark on a site accessible under the offending domain name, as Mr. Toeppen did. Similarly, the bill does not affect existing trademark law to the extent it has addressed the interplay between First Amendment protections and the rights of trademark owners. Rather, the bill gives courts the flexibility to weigh appropriate factors in determining whether the name was registered or used in bad faith, and it recognizes that one such factor may be the use the domain name registrant makes of the mark.

Fifth, under paragraph (1)(B)(i)(V), a court may consider whether, in registering or using the domain name, the registrant intended to divert consumers away from the trademark owner's website to a website that could harm the goodwill of the mark, either for purposes of commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site. This factor recognizes that one of the main reasons cybersquatters use other people's trademarks is to divert Internet users to their own sites by creating confusion as to the source, sponsorship, affiliation, or endorsement of the site. This is done for a number of reasons, including to pass off inferior goods under the name of a well-known mark holder, to defraud consumers into providing personally identifiable information, such as credit card numbers, to attract "eyeballs" to sites that price online advertising according to the number of "hits" the site receives, or even just to harm the value of the mark. Under this provision,